

No. 11510

IN THE

United States Circuit Court of Appeals
FOR THE NINTH CIRCUIT

JAY H. MONTGOMERY and VICTOR KREMER,

Appellants,

vs.

UNITED STATES OF AMERICA,

Appellee.

APPELLANTS' OPENING BRIEF.

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*To the Honorable the Ninth Circuit Court of Appeals
of the United States:*

This is an appeal from the judgment of conviction of the defendant under an indictment charging the defendant with violation of Second Revised Ration Order No. 3 and possessing a ration commodity not in accordance with the provisions of said Regulation in Counts II, V and VI of the indictment.

The defendant Montgomery was committed to one year in jail on each of the counts to run concurrently. The defendant Kremer was sentenced to serve 3 months in jail on each count.

Judgment was pronounced December 16, 1946.

Notice of appeal was given December 23, 1946 for Montgomery; December 24, 1946 for Kremer.
[R. 17-18.]

Jurisdiction.

Jurisdiction is invoked under the provisions of Title 28 Section 225 U. S. Codes and under the Second War Powers Act, Title 50, U. S. Code, App. 633 *et. seq.*

The Facts.

The appellant was charged with Count II, acquiring and possessing 10,000 lbs. of sugar not in accordance with the provision of the Second Revised Ration Order No. 3 or any ration order.

Count V of the Indictment charged him with acquiring, possessing and using a ration document, to-wit; O. P. A. Ration Check for 105,216 pounds of sugar which check was not acquired in accordance with a ration order because the amount of said ration check was in excess of any sugar allotment or allowance of the defendant Victor Kremer to whom said check was issued and by whom it was received.

Count VI charged the defendant, in company with other defendants, with securing, using, permitting the use of, possessing and control of a ration document not issued, to-wit; and O. P. A. Ration Check for 125,000 pounds of sugar, which check was not acquired in accordance with a ration order because the amount of said ration check was in excess of any allotment or allowance of the defendant Jay H. Montgomery to whom said check was issued, and by whom it was received.

Specification of Error.

I.

The indictment fails to state an offense against the laws of the United States.

II.

The indictment charges multiple conspiracies.

III.

The indictment attempts to create an offense not by reason of any Statute but by reason of an Administrative Order.

I.

The Indictment Fails to State an Offense Against the Laws of the United States.

The indictment merely charges that the defendants wilfully acquired and possessed sugar not in accordance with certain regulations. Nowhere does the indictment charge that the defendants unlawfully acquired and possessed the sugar.

The word “wilfully” is not interchangeable with “unlawfully.” Without charging that the acts done were done unlawfully no offense against the laws of the United States was stated.

An indictment must charge a violation of law. Merely setting up facts which may constitute a violation of law does not overcome the presumption of innocence which surrounds an accused.

People v. Schmitz, 7 Cal. App. 330, 373;

U. S. v. Cruickshank, 92 U. S. 542.

In *People v. Schmitz* the court said (page 374) “In no case can an indictment be ended by imagination or presumption.”

II.

The Indictment Charges Multiple Conspiracies.

It charges an over-all general conspiracy in violation of Section 88 and then it charges separate individual conspiracies in the various counts. This violates principles set out in *Kotteokus v. U. S.*, 90 L. Ed. 1557.

Also, the indictment violates congressional intent in permitting a felony and misdemeanor conspiracy growing out of the same transaction to be charged.

III.

The Indictment Attempts to Create an Offense Not by Reason of Any Statute but by Reason of an Administrative Order.

The Second War Powers Act did not give the Administrator authority to issue Executive Orders with the same force and effect as if they were Statutes or with the same authority as was given to the Administrator of the Office of Price Administration. The result is that an attempt is made to create an offense by Executive Order. This is contrary to the power of the Administrator.

Schechter v. U. S., 295 U. S. 495;

Panama Refining Company v. U. S., 293 U. S. 388;

Faher v. Amman, 91 L. Ed. 1574, 1577.

WHEREFORE, the defendants pray that judgment against them and each of them be reversed.

Respectfully submitted,

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